(5)

No. 89-1493

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,
Petitioner,

v.

JOSEPH E. O'NEILL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether petitioner breached its duty of fair representation by negotiating a back-to-work agreement that ended a strike by pilots against Continental Air Lines and allocated positions between returning strikers and pilots who worked during the strike?*

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* At the *certiorari* petition stage, our Petition at p. i, the respondents' Brief in Opposition at p. 1, and the Brief for the United States as *Amicus Curiae* at p. ii phrased the basic legal issue presented here in three different ways. At this juncture, and in the interest of focusing the discussion on the ultimate merits issue, we accept—and adopt as our own—the Solicitor General's formulation of the Question Presented.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 886 F.2d 1438 (5th Cir. 1989). The court of appeals also issued an unreported order upon petitions for rehearing and rehearing *en banc*. The District Court opinion was issued from the bench.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1989. Timely petitions for rehearing and rehearing *en banc* were denied on December 27, 1989. This Court has jurisdiction to review the judgment of the court of appeals by writ of *certiorari* pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaint alleges a breach of petitioner's duty of fair representation which has been implied from the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA").

STATEMENT OF THE CASE

This case arises out of one of the most bitter union-management disputes of recent times: the pitched labor battle between Continental Air Lines, Inc. ("Continental") and petitioner Air Line Pilots Association, International ("ALPA"). For over two years ALPA and Continental waged economic warfare and when the smoke cleared, ALPA had to sue for peace. In this lawsuit, ALPA now stands accused of having failed to do enough to protect the striking Continental pilots in working out those peace terms. The background facts are as follows:

In 1983, ALPA was a party to a collective bargaining agreement with Continental. On September 24, 1983, Continental filed for Chapter 11 reorganization in the Bankruptcy Court of the Southern District of Texas. Immediately thereafter, Continental unilaterally abro-

gated the Continental-ALPA collective bargaining agreement, secured bankruptcy court approval for the abrogation, and cut in half the pilots' contractual salaries and benefits. Continental's preemptive actions triggered a strike by the pilots and the beginning of an all-out labor confrontation. Joint Appendix ("J.A.") 79.

In the end, ALPA proved unable to significantly affect Continental's business. The Company succeeded in finding replacement pilots who were willing to cross ALPA's picket lines to work at Continental's reduced wage and benefit level. By August, 1985, Continental had a complement of 1,600 working pilots including 1,000 pilots who had been hired as permanent replacements and 600 pilots who had not joined the strike or who had abandoned the strike and returned to work; in comparison, 1,000 pilots remained on strike at that time. J.A. 80. At that point, Continental proceeded to press home its advantage.

On August 26, 1985, Continental stated that the Company was withdrawing recognition of ALPA as the bargaining representative for its pilots, and Continental broke off negotiations with ALPA over a new collective bargaining agreement. J.A. 80.

Two weeks later, on September 9, 1985, Continental announced its intention to fill its pilot vacancies by posting the "85-5 vacancy bid" for 441 captain and first officer positions and an undetermined number of second officer positions. J.A. 80. The 85-5 bid covered nearly all of the pilot vacancies expected at Continental in the foreseeable future; indeed, the 218 vacancies posted for captain positions was the largest such posting in Continental's history.[1] District Court Docket Reference ("R.")

[1] A "vacancy bid" in the airline industry is a long term pilot training and staffing plan, which projects and fills pilot staffing needs by base (*i.e.* geographic location), equipment (*i.e.* aircraft type), and position (*i.e.* captain, first officer, second officer). The projections are based on scheduled aircraft deliveries (or sales, leases, etc.), expected retirements or attrition, and marketing plans for future flight schedules. Once a system-wide vacancy bid is announced, each Continental pilot is allowed to "bid" his or her

131, Higgins Aff. ¶ 7. Under the terms of the 85-5 bid, pilots could bid on these positions over a nine day period, and bidding closed on September 18, 1985. J.A. 80-81.

In response, after emergency internal union consultations, several hundred of the striking pilots attempted to protect their post-strike job prospects by submitting bids. J.A. 81; deposition of D. Kirby Schnell at 436, 499.[2] On September 25, 1985, one week after the 85-5 bid closed, Continental filed a claim in federal court against ALPA seeking to void all the 85-5 bids tendered by strikers and stating that the strikers were not entitled to any of the 85-5 bid vacancies under any circumstances. (Deposition of John J. Gallagher, Exh. 118.) After the bid closed, Continental announced that all the posted bid vacancies had been awarded to working permanent replacement pilots. (R. 131, Higgins Aff. ¶ 8.)

In late September, the Continental Master Executive Council ("MEC") (the organizational subdivision of ALPA elected to function as the governing council for ALPA members employed by Continental) held a meeting to consider Continental's actions and the proper response. The discussion centered on what the MEC considered to be the only two viable options: making an unconditional offer to return to work or pursuing a negotiated end to the strike. J.A. 81.

The MEC first rejected a motion to make an unconditional offer to return and did so largely at the urging—and with the votes—of MEC members who are named representatives of the plaintiff group. Deposition of Robert Therrien ("Therrien dep.") at 96-104. In rejecting an unconditional return, the MEC made a judgment

preference for base, equipment, and status, and the bids are awarded in seniority order. The bid award assigns each pilot to a specific base, equipment, and position. A training schedule is devised to ensure that each pilot who requires training will be trained in position on a schedule designed to avoid any shortage of qualified pilots and any disruptions to service.

[2] All of the depositions in the case were filed with the district court and formed part of the summary judgment record.

that, in light of Continental's handling of the posted 85-5 bid, the proper course to take in seeking to obtain access for striking pilots to the bid positions (and any other pilot positions at Continental in seniority order) was through negotiation. R. 131, Higgins Aff. ¶ 8; Therrien dep. at 102-103. The MEC then authorized the MEC officers and negotiating committee chairman to negotiate a conclusion to the strike and the terms on which the striking pilots could return to work. R. 131, Higgins Aff. ¶ 16, Exh. J; Higgins dep. at 1019-20.

Following the MEC meeting, the ALPA negotiators requested the bankruptcy court to convene an intensive round of negotiations over a back-to-work agreement; Bankruptcy Judge Roberts agreed to do so. By the end of October, 1985, ALPA and Continental had negotiated, under the bankruptcy court's auspices, significant aspects of a back-to-work agreement but had failed to reach a complete strike settlement agreement. At the parties joint request, the bankruptcy court agreed to resolve the remaining open issues, and on October 31, 1985, Judge Roberts entered an order and award of the bankruptcy court covering all aspects of the return to work of ALPA pilots. J.A. 81.

The order and award was described by the bankruptcy court as "a global [settlement which] encompasses a myriad of individual situations and circumstances." The order and award's back-to-work provisions granted pilots who agreed to waive certain individual strike litigation claims against Continental the right to choose recall and reinstatement in seniority order ("Option 1") or, if not employed by another air carrier, voluntary severance with payment of $4,000 per year of service ($2,000 for pilots furloughed before the strike) ("Option 2"). Pilots who chose to preserve all their litigation rights against Continental were offered recall after the Option 1 pilots had been reinstated ("Option 3"). J.A. 11, 22-23, 28.

Significantly, although Continental had already awarded all of the posted bid positions to permanent

replacements, the order and award unwound those job assignments and guaranteed that nearly half the captain positions would be granted to returning strikers in seniority order. Permanent replacements were to receive the first 100 captain positions, returning strikers the next 70 and, thereafter, returning strikers and replacement pilots were to be awarded captain vacancies on a 1:1 ratio.[3] The remaining striking pilots were recalled to all available first and second officer positions and upon recall were allowed to bid in these positions purely on seniority basis. Continental also created a guaranteed schedule by which a substantial number of returning strikers would be promoted to captain or would receive captain's pay until vacancies within the schedule arose. Continental agreed too that it would accept offers to return from pilots who had already found substantially equivalent work with another employer. J.A. 11-15, 22-23, 31.

All of the foregoing provisions were subject to the continuing jurisdiction and enforcement power of the bankruptcy court to ensure that Continental would fulfill its obligations. Continental and ALPA, moreover, agreed to withdraw all its pending litigation against each other subject to the terms of the order and award.[4] J.A. 29-30.

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[3] Splitting captain positions pursuant to this formula was necessary during the post-strike transition period to facilitate an orderly integration of striking pilots back into the work force. Critically, however, other than Continental's right to assign the base and equipment of a pilot's initial captain position and to require up to six months' experience as a flight officer before serving as a captain, the order and award placed no restrictions on the pilots' exercise of seniority rights once the pilot was recalled to work. Another provision of the order and award permitted Continental to assign the base and equipment of a returning striker in his/her initial post-strike position. This provision merely memorialized a right that Continental would have had even under an unconditional offer to return.

[4] The order and award—which states that it did not "constitute express or implied recognition of ALPA by Continental"—did not

Nearly six months after entry of the order and award, a group of pilots commenced this class action on behalf of all pilots who joined the strike and were not working for Continental at the end of the strike, claiming that ALPA had breached its duty of fair representation in settling this labor dispute with Continental.

After extensive discovery, ALPA moved for summary judgment; the district court granted that motion and dismissed the complaint because the record evidence showed that the plaintiffs' claim was based on their dissatisfaction with the results their union officials obtained in good faith in the face of "what was indisputably a hostile intransigent employer." J.A. 75. That court found that there was nothing in the record to support an allegation that ALPA acted out of "personal animosity or illegal motives against these pilots." J.A. 76. Specifically, the district court found

> There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation. J.A. 74.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed. The court of appeals started from the premise that "[a] breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts," J.A. 87, and added

> "We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) *a rational result of the consideration*

enhance ALPA's position as a collective bargaining representative. J.A. 30.

> *of these factors*; and (3) inclusive of a fair and impartial consideration of the interests of all employees." [*Id.* at 88, quoting *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 n.6 (5th Cir. 1976); emphasis in original.]

And the court of appeals applied that legal standard to test the Union's judgments in settling the strike, concluding as follows:

> . . . We are persuaded that a jury would be entitled to infer that ALPA was arbitrary in accepting the strike settlement if it finds that the union should have expected much more favorable treatment for the pilots had the pilots simply given up the strike effort and offered to return to work. In other words, a jury might reasonably find the union's conduct irrational or arbitrary if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made. We conclude that a jury could find that the order and award left the striking pilots worse off in a number of respects than complete surrender to [Continental]. [J.A. 89.]

The court of appeals also concluded that a "genuine issue of material fact" existed as to whether the strike settlement agreement was discriminatory because of the "post-strike treatment of strikers," and that a "jury would . . . be entitled to find that the agreed-to settlement provisions breached the union's duty of fair representation because it impermissibly and unjustifiably divided the [Continental] pilots after recall into two camps of former strikers and nonstrikers and permitted [Continental] to discriminate against strikers." J.A. 93.

On October 1, 1990, this Court granted ALPA's petition for a writ of *certiorari*.

SUMMARY OF ARGUMENT

The court of appeals decision in this case rests on the proposition that *Vaca v. Sipes*, 386 U.S. 171 (1967), authorizes judges—and juries—to assess the rationality of a

union decision to negotiate a settlement of a strike and of the terms of the settlement. The court of appeals both misread and misapplied *Vaca*.

The salient point of this Court's cases from *Steele v. L.&N.R. Co.*, 323 U.S. 192 (1944), to *Steelworkers v. Rawson*, —— U.S. ——, 58 U.S.L.W. 4556 (May 24, 1990). is that the fair representation duty is an obligation "to exercise fairly the power conferred upon [the union] in behalf of all those for whom it acts, without hostile discrimination against them." *Steele*, 323 U.S. at 203. This Court has never sanctioned review of an honest union effort, not marked by invidious discrimination, to negotiate a union-employer agreement. To the contrary, the Court has recognized that regulating the adequacy of union representation is antithetical to the federal labor laws' system of free collective bargaining.

In part I of our argument we review the Court's major fair representaiton decisions from *Steele* forward to demonstrate that while the phrasing of the fair representation standard is not entirely uniform, the essence of the standard was set in *Steele* and has not been expanded or contracted. As the Court said in *Breininger v. Sheet Metal Workers*, —— U.S. ——, 110 S. Ct. 424 (1989): "The duty of fair representation had 'judicially evolved,' *Motor Coach Employees v. Lockridge*, [*supra*, 403 U.S. at] 301, as part of federal law as an essential means of enforcing fully the important principle that 'no individual union member may suffer invidious, hostile treatment at the hands of the majority of his co-workers.' *Ibid.*" Pp. 14-25 *infra*.

We then turn to a showing that precedent aside, neither the Railway Labor Act nor the National Labor Relations Act is susceptible to being read as granting the courts the authority to regulate the caliber of honest, good faith, non-discriminatory union decision-making. Precisely because the national labor policy relies on a collective bargaining process rather than on public law for the "ordering and adjusting of competing interests," *Teamsters*

Local v. Lucas Flour Co., 369 U.S. 95, 104 (1962), that policy does *not* provide for "governmental regulation of the terms and conditions of employment." *H.K. Porter Co. v. NLRB*, *supra*, 397 U.S. at 103.

The duty of *fair* representation, as recognized in *Steele*, fits comfortably within—and, indeed, is integral to—this collective bargaining system. But any attempt by the courts to regulate the quality of union representation by reviewing the soundness of decisions made by unions in the course of dealing with employers would be contrary to the national labor policy. The necessary result would be to make the courts—rather than employers and employees—the final arbiters of the terms and conditions of employment thereby producing through the back door the very result Congress refused to legislate in the RLA and the NLRA. Indeed, any effort to judicially impose standards of minimum representation upon unions would also threaten the policies of membership control of the unions through their own internal democratic processes underlying the Labor Management Reporting and Disclosure Act. Pp. 25-36 *infra*.

We conclude part I by demonstrating that under the correct legal standard, the district court properly granted summary judgment to ALPA herein. As the court of appeals stated, plaintiffs' "most fundamental complaint" is that ALPA should have "simply given up the strike effort and offered to return to work." J.A. 89. But that complaint goes solely to the adequacy—rather than the fairness—of the representation ALPA provided. Plaintiffs here also claim that the settlement agreement "impermissibly discriminated against strikers." J.A. 93. But as *Steele* states, "[v]ariations in the terms of the contract based on differences relevant to the authorized purposes of the contract are within the scope of the bargaining representative of a craft." 323 U.S. at 203. The differentiations here could not be more "relevant" to settling this strike on terms that benefit the strikers themselves. Pp. 36-39 *infra*.

In part II of the argument we meet the court of appeals on its own ground and demonstrate that ALPA's actions in settling the strike were entirely rational.

The court of appeals proceeded from three legal premises: first, had ALPA authorized an unlimited return to work, "the returning strikers, as [Continental] employees, were entitled to reinstatement as vacancies occurred" (J.A. 90); second, the "bid positions [covered by the 85-5 bid position offer] were not filled"—and hence were deemed to be vacancies—"until pilots were trained and serving in these positions" (J.A. 92); and third, that in filling these so-called vacancies, "if the pilots had unconditionally agreed to return to work, [Continental] could not have changed its policy of assigning work by seniority . . . unless it had a legitimate and substantial business justification for doing so." J.A. 91.

In each respect, the court of appeals answered—with the benefit of five years of legal development—questions of law that were very much unsettled as of 1985. And, whatever may be true today, the legal uncertainties that existed as of 1985 were more than sufficient to cause ALPA to settle for the proverbial "half a loaf." We therefore outline the various legal issues that could have arisen had ALPA decided to end the strike and make an offer to return to work without any strike settlement agreement. By considering, *from the perspective of the time*, the legal arguments that Continental would probably have made upon those issues, we demonstrate that ALPA had reason to believe that Continental had a sufficient chance of success on one or more of its arguments so that the striking pilots *could* have ended up in a substantially worse position, after years of litigation, than the position created by the negotiated strike settlement.

That, we submit, is more than sufficient to demonstrate that the Union acted not only fairly but rationally. Pp. 39-50 *infra*.

ARGUMENT

I. THE DUTY OF FAIR REPRESENTATION DOES NOT AUTHORIZE JUDGES OR JURIES TO SCRUTINIZE THE RATIONALITY OF A UNION'S GOOD FAITH JUDGMENT TO SETTLE A LABOR DISPUTE

Introduction

The district court granted summary judgment for the defendant union in this duty of fair representation case because that court found, on the basis of undisputed evidence, that ALPA in negotiating an end to its labor dispute with Continental had accepted "the best deal that the Union thought it could construct." J.A. 74.

In overturning that decision, the court of appeals did *not* purport to disagree with the trial court's assessment of the undisputed evidence. Rather, the appellate court took issue with the district judge's statement of the governing legal rule. The Fifth Circuit concluded that a decision by a union to settle a labor dispute may breach the duty of fair representation in situations in which the decision is "based upon relevant, permissible union factors" and is "inclusive of a fair and impartial consideration of the interests of all employees" *if*, in the eyes of a jury, that decision is not "rational" or is "inexplicable." J.A. 88.

The contrast between the approaches of the lower courts in this case is sharp indeed, and mirrors a fundamental division in the lower courts generally.[5] The district court proceeded on the understanding that the fair representa-

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[5] *See, e.g., Dement v. Richmond, F. & P. R. Co.*, 845 F.2d 451, 457-60 (4th Cir. 1988); *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876-78 (6th Cir. 1988); *Morgan v. St. Joseph Terminal R.R.*, 815 F.2d 1232, 1234 (8th Cir. 1987); *Crusos v. United Transp. Union*, 786 F.2d 970 (9th Cir.), *cert. denied*, 479 U.S. 934 (1986); *Berrigan v. Greyhound Lines, Inc.*, 782 F.2d 295, 297-99 (1st Cir. 1986); *American Postal Workers Union Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1098 (D.C. Cir. 1981).

tion duty is designed to assure that all members of a bargaining unit receive *equal* representation; the court of appeals on the understanding that the duty is a broader one guaranteeing at least minimally *adequate* representation.

Thus, the district court ended its inquiry upon finding "nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct," J.A. 74; the appellate court, on the other hand, went further by scrutinizing the Union's settlement decisions in order to ascertain whether the Union had a *sound basis for concluding* that the settlement was "the best deal that the Union . . . could construct."

The court of appeals based its decision on its reading of the portion of *Vaca v. Sipes*, 386 U.S. 171, 177 (1967), stating that the duty of fair representation obligates unions to "avoid arbitrary conduct." If the *Vaca* rule were as far-reaching as the court of appeals posited—and if *Vaca* were properly read to authorize judges or juries to scrutinize the rationality of a union's decision-making in settling a labor dispute with an employer—then, as we demonstrate below, *Vaca* would be directly contrary to *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the closest precedent to the instant case. In that event, it would be necessary for this Court in order to adjudicate the instant case: (i) to overrule—or otherwise modify—either *Vaca* or *Ford Motor*; or (ii), in the alternative, to delineate the sphere in which *Vaca* controls and the sphere in which *Ford Motor* controls. The issue concerning the interplay between *Ford Motor* and *Vaca*, too, has divided the lower courts.[6]

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[6] Three circuits are of the view that *Ford Motor* governs contract negotiation cases while *Vaca* governs contract administration cases and that *Ford Motor* allows for a greater measure of union discretion in negotiations than *Vaca* allows in grievance handling; *Thomas v. United Parcel Service*, 890 F.2d 909, 916-18 (7th Cir. 1989); *Burkevich v. ALPA*, 894 F.2d 346, 349 (9th Cir. 1980); and *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 2066 (1989).

Five other circuits appear to agree with the Fifth Circuit that a single fair representation standard derived from *Vaca* governs across the board: *Eatz v. DME Unit of Local Union Number 3*, 794 F.2d 29, 34 (2nd Cir. 1986); *Masy v. New Jersey Rail Operations, Inc.*, 790 F.2d 322, 327-28 (3d Cir.), *cert. denied*, 479 U.S. 916 (1986); *Morgan v. St. Joseph R. Co.*, 815 F.2d 1232 (9th Cir. 1987); *Eason v. Frontier Air Lines, Inc.*, 636 F.2d 293, 295 (10th Cir. 1981); and *American Postal Workers Union Local 6885 v. American Postal Workers Union, supra* (D.C. Cir.).

In the remaining three circuits, the question of whether there is a unitary fair representation standard is an open one: *Berrigen v. Greyhound, supra* (1st Cir.); *Smith v. Local 7898, United Steelworkers*, 834 F.2d 93, 96-97 (4th Cir. 1987); and *Ratkosky v United Transp. Union, supra* (6th Cir.).

It is our submission that the court of appeals both misread *and* misapplied *Vaca*. The salient point of this Court's cases from *Steele v. L.&N.R. Co.*, 323 U.S. 192 (1944), to *Steelworkers v. Rawson*, —— U.S. ——, 58 U.S.L.W. 4556 (May 24, 1990), is that the fair representation duty is an obligation to "*exercise fairly the power conferred upon [the union] in behalf of all those for whom it acts, without hostile discrimination against them.*" *Steele*, 323 U.S. at 203; emphasis added. This Court has never sanctioned review—by judges, juries or administrative bodies—of an honest union effort, not marked by invidious discrimination, to negotiate, to renegotiate or to elaborate on a union-employer agreement. To the contrary, the Court has recognized that regulating the adequacy of union representation is antithetical to the system of free collective bargaining that it is the purpose of the Railway Labor Act, 49 U.S.C. § 151 *et seq.*, and the National Labor Relations Act, 29 U.S.C. § 141 *et seq.*, to establish and that it is the purpose of the fair representation duty to make more coherent and complete.

A. *Vaca v. Sipes* Does Not Authorize Judicial Review of the Adequacy of Union Representation Generally or of the Rationality of Nondiscriminatory Settlement Decisions In Particular

We begin our analysis by following this Court's duty of fair representation precedents from *Steele* forward.

1. *The pre-Vaca v. Sipes Cases*—the fair-representation obligation was, as just noted, first recognized by this Court in *Steele v. L&N.R. Co., supra.* That case involved a challenge to a union's actions in negotiating a collective bargaining agreement whose terms expressly discriminated against black members of the bargaining unit; the Court had little difficulty in concluding that the union had acted unlawfully in so doing.

The *Steele* Court began its analysis by observing that if the RLA empowered unions to negotiate such discriminatory agreements, "constitutional questions arise" because under the RLA "the representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates." 323 U.S. at 198. The Court was satisfied, however, that "Congress . . . did not intend to confer plenary power upon the union . . . without imposing on it any duty to protect the minority." *Id.* at 199. "The use of the word 'representative' . . . plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent" and "is to act for and not against those whom it represents. . . ." *Id.* at 202.

The *Steele* Court went on to elaborate upon the scope of the duty of fair representation in the following terms:

> We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty *to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates.* . . . We hold that the language of the Act . . . expresses the aim of Congress to impose on the bargaining representative . . . the duty to *exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them.* [323 U.S. at 202-03; emphasis added.]

The Court hastened to add that "[t]his does not mean" that a union "is barred from making contracts which may have unfavorable effects on some of the members of the craft represented"; to the contrary, "[v]ariations in the terms of the contract based on differences *relevant to the authorized purposes of the contract* . . . are within the scope of the bargaining representative of a craft." 323 U.S. at 203 (emphasis added). But,

> [w]ithout attempting to mark the allowable limits of differences . . . it is enough for present purposes to say that the statutory power to represent a craft . . . does not include the authority to make among members of the craft *discriminations not based on . . . relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious.* Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. [*Id*; emphasis added.][7]

Ford Motor Co. v. Huffman, supra, the Court's second major fair-representation decision, further refined the lessons—and clarified the limits—of *Steele.* There a group of long-term Ford employees challenged a collective bargaining agreement granting seniority credit for military service even where the service preceded employment with Ford; the net effect of that agreement was to allow newly-hired veterans to outrank the long term employees. This Court rejected that challenge.

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[7] *See also Railroad Trainmen v. Howard,* 343 U.S. 768, 773 (1952) ("We held [in *Steele*] that the language of the Act imposed a duty on the craft bargaining representative to exercise the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against any of them").

In so doing, the Court started from the premise that the federal labor laws embody "the faith of Congress in free collective bargaining . . . when conducted by freely and fairly chosen representatives of appropriate units of employees." 345 U.S. at 337. The Court went on to recall, however, that "the authority of bargaining representatives . . . is not absolute [as] is recognized in *Steele*." *Id.* Rather, under *Steele*, the "statutory obligation to represent all members of an appropriate unit requires [unions] to make an *honest effort to serve the interests of all of those members, without hostility to any*." *Id.* (emphasis added).

As in *Steele*, the *Ford Motor* Court was quick to underscore the limits of the fair-representation duty, noting that

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. . . . Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. *A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.* [345 U.S. at 337-38; emphasis added.][8]

Humphrey v. Moore, 375 U.S. 335 (1964)—the third major fair-representation case and one which preceded

[8] *See also Conley v. Gibson*, 355 U.S. 41, 46 (1957) (duty of fair representation requires a union "to represent fairly and without hostile dsicrimination all of the employees in the bargaining unit" and "not to draw 'irrelevant and invidious' distinctions among those it represents").

Vaca v. Sipes, supra, by just three years—sounds the same theme. *Humphrey* involved a challenge to an agreement dovetailing the seniority lists of two employers, one of which had been acquired by the other. Junior employees of the acquiring employer, who were disadvantaged by the dovetailing, brought suit.

The *Humphrey* Court began by restating the fair representation law as developed through *Steele* and *Ford Motor*:

> The undoubted broad authority of the union as exclusive bargaining agent . . . is accompanied by a responsibility of equal scope, the responsibility and duty of fair representation. [Citation omitted.] "By its selection as a bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests *fairly and impartially*." *Wallace Corp. v. Labor Board*, 323 U.S. 248, 255. The exclusive agent's obligation "to represent all members of an appropriate unit requires [it] to *make an honest effort to serve the interests of all of those members, without hostility to any . . .*" and its powers are "*subject always to complete good faith and honesty of purpose in the exercise of its discretion.*" *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-338. [375 U.S. at 342; emphasis added.]

As in *Steele* and *Ford Motor*, the Court in *Humphrey* then stressed the limits of the duty:

> [W]e are *not* ready to find a breach of the collective bargaining agent's duty of fair representation *in taking a good faith position contrary to that of some individuals whom it represents* nor in supporting the position of one group of employees against that of another. . . . Just as a union must be free to sift out wholly frivolous grievances . . . so it *must be free to take a position on the not so frivolous disputes*. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these

> cases would surely weaken the collective bargaining and grievance processes. [*Id.* at 349-50; emphasis added.]

And the *Humphrey* Court found no breach of duty because

> the union took its position *honestly, in good faith and without hostility or arbitrary discrimination.* . . . By choosing to integrate seniority lists based upon length of service at either company, *the union acted upon wholly relevant considerations, not upon capricious or arbitrary factors.* The evidence shows no breach by the union of its duty of fair representation. [*Id.* at 350; emphasis added.]

2. *Vaca v. Sipes*—It was against this background that the Court decided *Vaca v. Sipes, supra.* At issue was a union's decision to withdraw, rather than to arbitrate, a grievance of an employee who had been discharged on the ground that he was not physically fit to do the heavy work his job entailed; the Court was called upon to determine whether the challenge to the union's conduct was within the exclusive primary jurisdiction of the National Labor Relations Board and, if not, whether the plaintiff had proven a fair-representation violation.

The *Vaca* Court began its analysis by restating the "now well established" rule that the "Union had a statutory duty fairly to represent all of th[e] employees" in plaintiff's bargaining unit. 386 U.S. at 177. The Court traced that rule back to *Steele* and *Ford Motor*, and summarized the teaching of those cases as follows:

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. [386 U.S. at 177.]

And the Court concluded that fair representation claims are judicially cognizable, noting that "the duty of fair

representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Id.* at 182.

Having established the lower court's jurisdiction over the plaintiff's claim, the Court went on to consider whether the plaintiff had made out that claim. The Court began by restating the controlling legal standard in words on which the court below in the instant case relied: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190, *citing Humphrey v. Moore, supra*; *Ford Motor Co. v. Huffman, supra.* And the Court applied that legal standard as follows:

> In administering the grievance and arbitration machinery as statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner, make decisions as to the merits of particular grievances. See *Humphrey v. Moore*, [*supra*]; *Ford Motor Co. v. Huffman*, [*supra*]. . . . [H]ere, the Union processed the grievance into the fourth step [of the grievance procedure], attempted to gather sufficient evidence to prove Owens' case, attempted to secure for Owens less vigorous work at the plant, and joined in the employer's efforts to have Owens rehabilitated. Only when these efforts all proved unsuccessful did the Union conclude both that arbitration would be fruitless and that the grievance should be dismissed. *There was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith.* . . . [W]e must conclude that th[e] duty was not breached here. [386 U.S. at 194-95; emphasis added.][9]

[9] In dictum, the *Vaca* Court suggested that "when Owens supplied the Union with medical evidence supporting his position, the Union might well have breached its duty had it ignored Owens' complaint or had it processed the grievance in a perfunctory man-

3. *The post-Vaca v. Sipes cases—Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971)—decided just four years after *Vaca*—provides an informative gloss on the meaning of the earlier opinion. *Lockridge* arose from a union's action in seeking and obtaining the discharge of a union member who had fallen in arrears in paying his union dues. The question presented was whether Lockridge's challenge to the union's action was preempted by the NLRA. The plaintiff sought to avoid preemption by invoking the *Vaca* preemption analysis and arguing, *inter alia*, that "the suit, in essence, was one to redress [the union's] breach of its duty of fair representation."

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ner." 386 U.S. at 194. *See also id.* at 191 ("a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion").

This portion of *Vaca*, standing alone, is, admittedly, ambiguous. As Judge Posner has observed, "[p]erfunctory" could "just mean refusing—deliberately refusing—to do more than go through the motions. [Citations omitted.] But it could also cover a case of sheer forgetfulness." *Graf v. E.J. & E. Ry.*, 697 F.2d 771, 778 (7th Cir. 1985). However that may be, we now know that the latter reading of *Vaca* cannot be squared with this Court's subsequent holding that "negligence . . . would not state a claim for breach of the duty of fair representation." *Steelworkers v. Rawson*, —— U.S. ——, 58 U.S.L.W. 4556, 4559 (May 14, 1990).

Thus, we submit that the *Vaca* dictum is properly read to particularize the legal standard stated in *Vaca* where a union acts with deliberate indifference. For, when a union deliberately ignores a *meritorious* grievance or processes that grievance in a half-hearted fashion, it is ordinarily fair to assume that the union's decision was based on irrelevant or impermissible considerations such as the identity of the grievant. The Court has subsequently made this very point: "a union breaches its duty when the conduct is 'arbitrary, discriminatory or in bad faith,' as, for example, when it 'arbitrarily ignore[s] a meritorious grievance or processes[es] it in [a] perfunctory fashion"). *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1971).

We do not pause further to pursue the meaning of this aspect of *Vaca* because in this case no claim is made that the Union acted "perfunctorily" in negotiating the agreement under challenge and the court below did not purport to rely on this aspect of *Vaca* in questioning the rationality of the Union's decision-making.

403 U.S. 298. The Court rejected that effort on the ground that Lockridge had neither pleaded nor demonstrated the necessary elements of a fair representation claim:

> For such a claim to be made out, Lockridge must have proved "arbitrary or bad-faith conduct on the part of the Union." *Vaca v. Sipes*, *supra*, [386 U.S.] at 193. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey v. Moore*, *supra*, [375 U.S.] at 348. Whether these requisite elements have been proved is a matter of federal law. . . . [T]hey were not even asserted to be relevant in the proceedings below. [403 U.S. at 299-300.]

The *Lockridge* Court explained why the elements of "fraud, deceitful action, or dishonest conduct" are of the essence to the fair representation cause of action by noting that "this Court's refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy." 403 U.S. at 301. The safeguard against such a conflict is that

> *The duty of fair representation was judicially evolved . . . to enforce fully the important principle that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers.* . . . [T]he fact that the doctrine was originally developed and applied by courts, after passage of the Act, *and carries with it the need to adduce substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives* ensures that the risk of conflict with the general congressional policy favoring expert, centralized administration and remedial action is tolerably slight. . . . If, however, the congressional policies . . . are not to be swallowed up, *the very distinction, embedded wtihin the instant lawsuit itself, between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the*

other, needs strictly to be maintained. [*Id.* at 301; emphasis added.] [10]

4. *The Lesson of this Court's Decisions*—The foregoing demonstrates that while the phrasing of the fair representation duty has not been entirely uniform over time, the *essential nature* of the duty was set forth in *Steele* over forty years ago and has not been expanded or contracted in the intervening years.

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[10] Two other, post-*Vaca* cases shed light on *Vaca* and merit brief mention.

The first is *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), in which the Court held that an employee may pursue a breach of contract suit against his employer even after the dispute has been subject to arbitration if the employee is able to prove that the union breached its duty of fair representation in presenting the grievance to the arbitrator. In reaching this conclusion the Court emphasized the need to assure "some minimum levels of *integrity*" in the grievance procedure, *id.* at 571, and to protect employees where the "process has fundamentally malfunctioned by reason of the bad-faith performance of the union," *id.* at 569. The Court added:

> The grievance processes cannot be expected to be error free. . . . But it is quite another matter to suggest that erroneous arbitration decisions must stand even though the employee's representation by the union has been *dishonest, in bad faith, or discriminatory.* [424 U.S. at 571; emphasis added.]

Significantly, the *Hines Court* did not suggest a need to protect union members from inadequate union representation.

Breininger v. Sheet Metal Workers, —— U.S. ——, 110 S. Ct. 424 (1989), evidences the same understanding. In explaining there why state law claims regarding the operation of hiring halls are preempted whereas fair-representation claims are not, the Court reasoned:

> The duty of fair representation is different. It has "judicially evolved," *Motor Coach Employees v. Lockridge*, [*supra*, 403 U.S. at] 301, as part of federal labor law—predating the prohibition against unfair labor practices by unions in the 1947 LMRA. *It is an essential means of enforcing fully the important principle that "no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers." Ibid.* [110 S. Ct. at 432; emphasis added.]

Steele, as we have seen, creates an equal protection regime that requires the union to "represent all its nonunion or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith." 323 U.S. at 204. *Ford Motor* is clearly to the same effect: unions must "make an honest effort to serve the interests of all those members without hostility to any." 345 U.S. at 337. Pp. 14-16, *supra.*

Humphrey v. Moore, as we have also seen, introduces the word "arbitrary" to the fair representation lexicon: the union must, said the Court, act "honestly and in good faith" and must do so "without hostility or *arbitrary* discrimination"; distinctions among employees must be based on "wholly relevant considerations, not upon capricious or *arbitrary* factors." 375 U.S. at 350; emphasis added. Pp. 16-18, *supra.* Plainly the context—particularly the juxtaposition to honesty and good faith—shows that the phrases "arbitrary discrimination" and "arbitrary factors" are being used to signify a differentiation based on such irrelevant considerations as personal favoritism or hostility. To put this another way, "arbitrary" is used as a synonym for "illicit." The point of *Humphrey*, after all, is that "we are *not* ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents." *Id.* at 349. The Court made that point precisely because a union acting in "good faith . . . must be free to take a position on the not so frivolous disputes" and because a legal rule that would limit that freedom would "remove or gag the union in these cases" and, thus, would "surely weaken the collective bargaining and grievance process." *Id.* at 349-50.

Vaca continues to use "arbitrary" in the same sense as *Humphrey*. There is not a word in the *Vaca* opinion so much as hinting at a redefinition of that term or of the duty of fair representation generally; to the contrary, *Vaca*'s opinion retraces the development of the

law from *Steele* to that time and does so by citing with approval and quoting from the precedents we have just reviewed. 386 U.S. at 177-178, 182, 190, 194. Moreover, *Vaca*, in sustaining the union's actions there emphasizes that "[t]here was no evidence that any Union officer was personally hostile to Owens or that the Union acted at any time other than in good faith." *Id.* at 194. The Court did *not* purport to evaluate the facts to determine whether the union's judgment on the merits was well reasoned or badly reasoned nor did the Court purport to determine whether the union's judgment was correct or incorrect.

Finally, *Lockridge* restates in the clearest possible terms the teaching of the cases from *Steele* to *Vaca*:

> For . . . a [fair representation] claim to be made out, Lockridge must have proved "arbitrary or bad-faith conduct on the part of the Union." *Vaca v. Sipes, supra* [386 U.S.] at 193. There must be "substantial evidence of fraud, deceitful action or dishonest conduct." *Humphrey v. Moore, supra* [375 U.S.] at 348. [403 U.S. at 299.]

The governing principle, the *Lockridge* Court continued, is "that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his coworkers." *Id.* at 301.

Against this background, the court of appeals' critical error stands out in bold relief.

Under *Steele* and its progeny, it was perfectly proper for the courts below to ascertain whether ALPA, in deciding to settle the labor dispute with Continental, and in framing the settlement, was carrying out its representational function honestly and in good faith. In so doing, to use some of the court of appeals' words, it was also proper to ascertain whether the Union based its decision on such impermissible factors as "personal animosity or political favoritism." J.A. 88.

Similarly, to the extent the settlement agreement was challenged as sanctioning differential treatment of a sub-

group of the represented employees, *Steele* provides for judicial review to assure that the distinction drawn is one that is "relevant to the authorized purposes of the [agreement]" and not one "like a discrimination based on race" that is "irrelevant and invidious." 323 U.S. at 203. This inquiry, like the first, is a traditional one in equal protection jurisprudence.

The court below went further, however, in authorizing an inquiry into honest, good faith and nondiscriminatory union decision-making in order to ascertain whether there were other options for concluding a strike that could have provided "more favorable treatment" for the complaining strikers and, if so, whether the union had a "rational" explanation for the choice that was made. J.A. 89. It bears particular emphasis that, as far as the court below was concerned, it would be a sufficient basis for liability to conclude that the union chose an option that was in some respects acceptable if that choice "left the complaining employees worse off in a *number of respects*" than another choice. J.A. 89; emphasis added.

This process whereby a judge—or a jury—evaluates the *comparative substantive merits and demerits* of the terms and conditions of a labor-management agreement has nothing to do with the evaluation of the union's honesty and good faith in negotiating such agreements called for by this Court's fair representation precedents. Nothing in *Vaca*, its predecessors, or its progeny justifies such a radical reworking of the law as it has stood since *Steele* was decided. For this reason alone the decision below must be reversed.

B. The National Labor Policy Does Not Permit Judicial Review of the Adequacy of Union Representation Generally or of the Rationality of Nondiscriminatory Settlement Decisions In Particular

The foregoing establishes that, strictly as a matter of precedent, the court below erred in reading *Vaca* as establishing a minimum standard of adequate representa-

tion regulating the caliber of non-discriminatory union decision-making. As we now show, precedent aside, neither the RLA nor the NLRA is susceptible to being read as imposing such a duty. To the contrary, important aspects of the national labor policy would be seriously undermined if the courts were to assume on their own such a regulatory authority.

(1) At the threshold, it is important to bear in mind that although the duty of fair representation is not expressly provided for in either the RLA or the NLRA, that duty is, nonetheless, a "statutory duty," *Vaca*, 386 U.S. at 177, one that has been "implied from the statute and the policy which it has adopted," *Steele*, 323 U.S. at 204; *Electrical Workers v. Foust*, *supra*, 442 U.S. at 47. Those sources necessarily define the limits of this statutory duty as well. We therefore begin by reviewing the fundamentals of the national labor policy.

Since the enactment of the RLA and the NLRA, "the story of labor relations in this country has largely been a history of governmental regulation of the process of collective bargaining." *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 102 (1970). These laws are "[p]redicated on the assumption that individual workers have little, if any, bargaining power, and that 'by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours and working conditions.'" *Barentine v. Arkansas-Best Freight System*, 450 U.S. 728, 735 (1981), *quoting NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

Accordingly, where an employee group freely chooses union representation, both laws impose on employers the duty to bargain collectively with the "chosen representative" over the employee's terms and conditions of employment. In that circumstance, both the RLA and the NLRA "extinguish[] the individual employee's power to

order his own relations with his employer and create[] a power vested in the chosen representative to act in the interests of all employees." *NLRB v. Allis-Chalmers*, *supra*, 388 U.S. at 180. In this way "a general process [is] established" to "ensure that employees as a group [can] express their opinions and exert their combined influence over the terms and conditions of their employment." *H.K. Porter Co. v. NLRB*, *supra*, 397 U.S. at 103.

At the same time, and precisely because the national labor policy relies on a collective bargaining process rather than on public law for the "ordering and adjusting of competing interests," *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962), that policy does *not* provide for "governmental regulation of the terms and conditions of employment." *H.K. Porter Co. v. NLRB*, *supra*, 397 U.S. at 103. "The goal of federal labor policy . . . is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations." *Teamsters Union v. Oliver*, 358 U.S. 283, 295 (1959). Congress thus "intended that the parties should have wide latitude in their negotiations, unrestricted by any governmental power to regulate the substantive solution of their differences." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960). And, "[i]f the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution." *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219 (1979).

(2) The duty of *fair* representation, as recognized in *Steele* and as applied by the district court in the instant case, fits comfortably within—and, indeed, is integral to—this collective bargaining system. As *Steele* recognizes, that system would be internally incoherent—and constitutionally suspect—if the labor laws provided for *exclusive* representation without also mandating *fair* representation of all those within the represented group.

Thus, as *Steele* concludes, "[t]he fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and is to act for and not against those whom it represents." 323 U.S. at 202. This is "a correlative duty 'inseparable from the power of representation.'" *Electrical Workers v. Foust, supra,* 442 U.S. at 46.

Equally to the point, as articulated in *Steele*, the duty of fair representation is one that the judiciary can readily apply by invoking norms and concepts familiar to the law that do *not* interfere with the "wide latitude" labor policy accords employers and employees to "establish their own charter for the ordering of industrial relations." P. 27 *supra.*

Steele expressly equates the union's statutory duty "to protect equally the interests of the members of the craft" and the duty "the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." 323 U.S. at 202. The courts are, of course, well-accustomed to elaborating and enforcing this constitutional norm. That being so, requiring unions to provide such equal representation—and precluding union decision-making on "irrelevant [or] invidious" grounds, *Steele*, 323 U.S. at 203—does *not* inject the government into the substance of the collective bargaining process.[11]

(3) It is one thing to imply and enforce a duty of *fair* representation, and quite another to imply and enforce a duty of *adequate* representation, one that seeks to regulate the soundness of even honest, non-discriminatory union decisions. The former does not necessarily encompass the latter because, as Judge Easterbrook has put it, "[r]epresentation is 'fair' even if ineffectual," *Antrim v. Burlington Northern, Inc.*, 847 F.2d 375, 378 (7th Cir. 1988). While a system of exclusive representation demands *equality* of representation if that system is to function properly, the proposition that unions are the statutory representatives of all (rather than some) employees within the bargaining unit does *not* demand that the *quality* of union representation is to meet specified standards set by, and enforced through, public law. Thus the statutory predicates underlying *Steele's* recognition of a duty of "fair representation" do not entail the recognition of a duty of *adequate* representation.

[11] Even so, elaborating upon this limited duty can pose confounding problems in the real world of labor relations in which all too often inadequate resources must be divided and hard questions arise as to what are "relevant" or "legitimate" grounds for determining who receives those benefits in what amounts. *See* Freed, Polsby & Spitzek, *Unions, Fairness, and the Conundrums of Collective Choice*, 56 S.Cal.L.Rev. 461 (1983).

It is, moreover, of the essence that any attempt by the courts to regulate the quality of union representation by reviewing the soundness of decisions made by unions in the course of dealing with employers would undermine the national labor policy. Subjection of such union decisions to judicial scrutiny not merely as to the union's *bona fides* but as to the union's rationality inevitably would put judges and juries, to a greater or lesser extent, in the position of reviewing the competence of union negotiators and decision-makers and of evaluating the soundness of their judgments. If a union were unable to satisfy the judge or jury on these scores, the union's decision could not stand. The necessary result would be to make the courts—rather than employers and employees—the final arbiters of the terms and conditions of union-management agreements thereby producing through the back door the very result Congress refused to legislate in the RLA and the NLRA.

The instant case illustrates the point well. When all is said and done, plaintiffs here challenge the wisdom of ALPA's decision to settle with Continental; it is the plaintiffs' theory that the bargaining unit employees would have been better served had the employees uncon-

ditionally offered to return to work without a settlement agreement. The Fifth Circuit, in the decision below, agreed to entertain that challenge absent any evidence that the Union was motivated by extraneous—much less invidious—considerations in deciding to settle, and that court left it to a jury to decide whether the Union's judgment in settling was, in the jury's view, a "rational" one.

But under our national labor policy it is *not* for the *government*—either legislatively or judicially—to decide whether a group of striking employees would be better served by settling or by capitulating to the employer without a settlement; that is precisely the type of decision that is for the employees to make through their chosen representative.

The threat to private decision-making posed by the ruling below is especially severe in light of the process contemplated by the lower court for testing the rationality of union decisions. In the nature of things, the judgments unions are called upon to make in their dealings with employers are *practical* judgments about what is achievable under the circumstances that obtain. Those decisions must be made in the heat of economic battle, and in situations in which the most critical factor—the employer's needs and wants—is beyond the union's control and beyond the union's accurate prediction.

Yet under the decision below, review of those decisions would be vested in a judge—or in lay jurors—who are wholly outside the ongoing labor relations system in which the decisions are played out, and who would be reviewing the decisions *post hoc* and with the full benefit of hindsight. Decisions which made good sense in context, and to the active participants, may be perceived quite differently by outsiders reviewing the decisions in a different setting and at a different time. Thus the danger that judges and lay jurors will assume for themselves the responsibility to decide what is best for union members is great indeed as the decision below so amply demonstrates.

(3) Rather than authorizing the courts to police the quality of the representation provided by unions, Congress has chosen a very different course to protect union members from inadequate representation: through the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401 *et seq.* ("LMRDA"), Congress has sought to "ensur[e] that unions would be democratically governed and responsive to the will of their memberships." *Finnegan v. Leu*, 456 U.S. 431, 436 (1982).

Two Titles of the LMRDA are especially relevant here. Title IV of the LMRDA extensively regulates the electoral process within labor unions "to insure 'free and democratic elections.'" *Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 539 (1984); towards that end, Title IV requires that union officers be elected at periodic intervals, 29 U.S.C. § 481(a); Title IV grants all members the right to run for union office and to vote in union elections, *id.* § 481(e); and Title IV controls the campaign process and the balloting to assure fair elections, *id.* 481(a), (b), (c), (e). In addition, LMRDA Title I —the "Bill of Rights" for union members—grants union members individually certain rights (such as the right of free speech and assembly and the right of due process in disciplinary proceedings), *see* LMRDA § 101(a)(2), (a)(4), 29 U.S.C. § 411(a)(2), (a)(4), and grants union members collectively the right to decide upon "the rates of dues and initiation fees payable by members," LMRDA § 101(a)(3), 29 U.S.C. § 411(a)(3).

Of course, as Judge Posner has observed, "union democracy no more guarantees a minority against oppression by the majority than political democracy does," *Dober v. Roadway Express Inc.*, 707 F.2d 292, 295 (7th Cir. 1983), and thus the LMRDA in no sense obviates the need for a duty of *fair* representation. But as Judge Posner goes on to note, in light of the LMRDA, union

members "do not need [judicial] protection against representation that is inept but not invidious" because if a "union does an incompetent job . . . its members can vote in new officers who will do a better job or they can vote in another union." *Id.*

Indeed any effort to judicially impose standards of minimum representation upon unions would threaten the policies underlying the LMRDA as well as the policies underlying the collective bargaining system itself. Under the LMRDA, it is for union members to decide upon the degree of experience, judgment and the like that they desire in their leaders;[12] the courts thus have no business imposing standards requiring a certain level of training and experience. And under the LMRDA it is for union members to decide upon the level of union dues and on how those dues will be spent; the courts may not impose standards of representation that limit the freedom of members to make such judgments.[13]

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[12] Under the LMRDA union members are guaranteed the right to select the decision-makers for the union; indeed, unions are not free to establish experience or similar qualifications to hold union office because " 'the assumption is that voters will exercise common sense and judgment in casting their ballots.' " *Steelworkers v. Usery*, 429 U.S. 305, 309 (1977). *See also Wirtz v. Hotel Employees*, 391 U.S. 492 (1968); *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463 (1968); *Wirtz v. Laborers' Union*, 389 U.S. 477 (1968).

[13] As Judge Easterbrook has observed, under the LMRDA it is for union members to "choose the level of care for which they are willing to pay." *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242, 244 (7th Cir. 1986):

> A union could secure the skills and perseverance of a good litigation team only by paying the steep fees these skills command in the market. A union may choose to rely on part-time, untrained overworked grievers—with the inevitable difference in the outcome of some cases—rather than purchase a higher quality of representation. A union may conclude that its limited resources should go into a strike fund or toward negotiating the next contract. [*Id.* at 245.]

(4) Finally, there are some "intensely practical considerations," *Vaca*, 386 U.S. at 183, that militate against requiring a union to satisfy a jury that the union's decision to resolve a dispute with an employer was "rational."

If unions were called upon to defend not only the *bona fides* but also the rationality of their collective bargaining decisions, each union defendant would be forced to expose in a public proceeding its entire internal thought processes in minute detail. The union would have to explain its assessment of its own—and the represented employees'—strengths and weaknesses. At the same time, the union would have to reveal its information on the employer's wants and needs, and the union's evaluation of the employer's bargaining strengths and weaknesses. All of that information inevitably would be of enormous value to the employer in its ongoing dealings with the union.

Indeed, in a regime in which unions were forced to defend the rationality of their settlement decisions, the ultimate determination of liability could well turn on whether the employer chose to confirm or contest the union's assessment of the relative positions of the parties. An employer interested in its long-run interests in dealing with the union could lend a vital hand to the union's defense; an employer bent on achieving an immediate advantage could offer aid and comfort to the fair-representation plaintiff. In either event, the reliability of the fact-finding process would be open to serious question.

(5) All of the considerations just reviewed militate against imposing minimum standards of adequate representation upon unions in the performance of their representation functions. Having said that much, it is only fair to go on to say that a rule that demands fair—as distinguished from adequate—representation will inevitably result in "hard cases" in which bargaining unit members do not have judicial protection against ineffectual, careless, or even thoughtless representation. In

the final analysis, the question posed here is whether the Court ought to imply an employee right and cause of action that would attend to such cases.

The creation of any such right and remedy, we submit, is peculiarly a legislative—not a judicial—task. As a general matter, it is for Congress to define the rights, duties, and liabilities arising under federal statutes; " 'the essential predicate for implication of a private remedy simply does not exist' " unless "such 'congressional intent can be inferred from the language of the statute, the statutory structure, or some other source." *Karahalios v. Federal Employees*, —— U.S. ——, 109 S. Ct. 1282, 1286 (1989).

That general caution is very much to the point here for two reasons. First, there is nothing in the RLA—the statute under which this action arises—that suggests a congressional intent to regulate the quality of representation provided by unions. Second, as we have just shown, creation of an "adequate" representation rule exacts large costs to the collective bargaining system for any gains achieved. Particularly given the delicacy of the balances Congress has struck in crafting the national labor policy—and Congress' insistence since the 1930s that labor policy should be a legislative policy and *not* a judicial policy, *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 382-83 (1969)—the determination as to whether the potential benefits outweigh those potential losses is peculiarly one for Congress to make.

(6) Our showing to this point demonstrates that the labor laws provide a guarantee to employees of honest, good faith union representation, *not* of adequate, rational representation. But, we would be derelict in our responsibilities in *this* case if we did not add that a lesser demonstration suffices to require reversal of the decision below.

This case, as we have emphasized, concerns the settlement of a strike through the negotiation of a union-

management agreement. Plainly the dangers to the free collective bargaining system posed by judicial review of the substance of union decision-making are most urgent in this context.

In this society there is no agreed-on calculus for determining how much is management's, how much is labor's and how much of what is labor's is for any particular group of workers. It is precisely because that is so that such determinations are largely made through negotiations (or through market exchanges) and not through government decree. And even assuming that there were such a calculus of distributive justice, the collective bargaining system is not designed to guarantee just results. "The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. . . . 'In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics.' " *Labor Board v. Insurance Agents*, 361 U.S. 477, 488-489 (1960), *quoting* Cox, *The Duty To Bargain In Good Faith*, 71 Harv.L.Rev. 1401, 1409.

Given all these considerations, union-management negotiations provide the last situation in which judicial review of the rationality of the parties' decision-making should be permitted.

Of at least equal moment, neither of this Court's two prior fair representation cases that arose in the context *Ford Motor*, *supra*—contain so much as a word suggesting the kind of far-reaching review of the substance and quality of union decision-making called for by the decision below. To the contrary, *Ford Motor* states that the union's obligation is one of "complete good faith and honesty of purpose in the exercise of its discretion." 345 U.S. at 338. Indeed, the court below rested its decision entirely on *Vaca v. Sipes*' formulation of the fair representation duty and most particularly on *Vaca*'s condemnation of "arbitrary" union actions. *Vaca*, however, did

not arise in the negotiation context but rather in a context in which the union was evaluating the merits of a discrete contract grievance. By any measure of complexity and delicacy, the union's task in evaluating such a grievance is qualitatively different from the negotiation task ALPA was called on to perform here.[14] For all the reasons we have given, we do not believe that the *Vaca* Court intended the kind of rationality review called for in the decision below even in the situation presented in *Vaca*. But however that may be, we add at this point that if we are wrong in that regard, the Court should hold that it is the *Ford Motor* standard—and not the *Vaca* standard—that governs this—and similar—negotiation cases. *See Thomas v. United Parcel Service, Inc.*, 890 F.2d 909, 916-917 (7th Cir. 1989).

C. ALPA Satisfied Its Duty of Fair and Equal Representation in Settling the Strike at Continental

The remaining question is whether, applying the proper legal standard as developed in the cases from *Steele* to *Lockridge*, the district court acted properly in granting summary judgment to ALPA. That question can be answered in brief compass.

(1) As the court of appeals stated, plaintiffs' "most fundamental complaint" is that ALPA should have "simply given up the strike effort and offered to return to work." J.A. 89. But that complaint goes solely to the adequacy—rather than the fairness—of the representation ALPA provided. The only relevant question is whether ALPA's judgment was infected by illicit or other similarly irrelevant considerations. And the district court found, on the basis of the undisputed evidence, that the union acted in complete good faith. That being so, there is nothing left to plaintiffs' "most fundamental complaint."

[14] We formulate the situation presented in *Vaca* as we do to underline the point that unions perform a range of tasks in the elaboration and enforcement of collective bargaining agreements many of which are akin to, or partake of, the negotiation and renegotiation of the agreement. "The grievance procedure is . . . a part of the continuous collective bargaining process." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960). And, as *Ford Motor*—which concerned the renegotiation of an agreement during its term—shows, it is the *Ford Motor* standard rather than any "adequate representation" standard that fits these more complex contract administration situations.

It is precisely because linedrawing of this kind is inherent in a bifurcated fair representation scheme and creates distinctions more nice than obvious that we argue in the text that the right rule is a single "honesty and good faith" gauge.

(2) The plaintiffs here also claim that the settlement agreement "impermissibly discriminated against strikers." J.A. 93. That the settlement does discriminate—in the sense of treating strikers and non-strikers differently—cannot be denied; the agreement permits Continental to allocate certain 85-5 bid positions to strikers and others to non-strikers. But such a discrimination is hardly "impermissible."

As the Court in *Steele* observed, "[v]ariations in the terms of the contract based on differences relevant to the authorized purposes of the contract are within the scope of the bargaining representative of a craft." 323 U.S. at 203. The diffeerntiations here could not be more "relevant": faced with the reality that 1600 pilots were nonstrikers and only 1000 pilots were strikers, and an employer who insisted that all promotion opportunities for the foreseeable future had been finally and lawfully awarded to the non-strikers, ALPA negotiated a settlement agreement acknowledging the situation as it was and coming to grips with the problem by allocating scarce resources—jobs—between the two competing groups. Plainly, ALPA did not exceed its discretion in negotiating this agreement.

First of all, there can be no doubt that Continental had the prerogative to restructure its employment rules in ways that would have the result of enhancing the comparative employment position of nonstrikers. It is equally plain that once the Company had done so, the striking pilots would not, as a matter of public law, have been

entitled to any of the benefits ALPA obtained for the strikers as a class in the settlement agreement. This Court's decisions from *Labor Board v. Mackay Co.*, 304 U.S. 333 (1938), to *Trans World Airlines v. Independent Federation of Flight Attendants*, —— U.S. ——, 109 S. Ct. 1225 (1989), so hold.

Thus, the discrimination claim here reduces to the proposition that a union that concludes that an employer may well have acted within its rights during a strike in reallocating job rights and that negotiates a strike settlement recapturing *some* of those job rights for strikers as a class that is above and beyond what public law would provide is *guilty of invidious discrimination against the strikers.* On that proposition, a union can only negotiate a strike settlement if all the strikers agree that they have no viable public law claims *and* if the union succeeds in placing all the strikers in the employment position they would have occupied if no permanent replacements had been hired and no strikers had abandoned the strike to return to work.

To state that proposition is to refute it. *See, e.g., Metropolitan Edison v. NLRB*, 460 U.S. 693, 705-06 (1983); *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974); *Gem City Ready Mix Co. & Jack Roberts*, 270 N.L.R.B. No. 1260 (1984) (all recognizing a union's broad authority to negotiate modification of both statutory and contractual rights in order to end a strike, to regain jobs, or to achieve other valid labor objectives).

In support of its ruling on the discrimination claim, the court of appeals noted that the strike settlement limited the opportunity for promotion available to recalled strikers during the transitional period at the end of the strike and stated that this result is " 'inherently destructive of employee rights' " on the ground that the "Supreme Court has expressed special concern for post-strike working conditions which 'create' a cleavage . . . [between employees] who stayed with the union and those who returned before the end of the strike and thereby

gained extra seniority.' " J.A. at 93, quoting *NLRB v. American Olean Tile Co.*, 816 F.2d 1496 (6th Cir. 1987), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

The court of appeals' position in this regard fails to do business with—and in any event cannot be squared with—this Court's *TWA v. IFFA* decision. In that case, the plaintiffs argued that a carrier's refusal to displace crossovers with senior strikers after a strike constituted unlawful discrimination under *Erie Resistor* on the theory that such a refusal "will create a 'cleavage' between [strikers and non-strikers] 'long after the strike is ended.' " 109 S.Ct. at 1231 (quoting *Erie Resistor*, 373 U.S. at 231). This Court "reject[ed] this effort to expand *Erie Resistor*." 109 S.Ct. 1232.[15]

Yet the very same argument is made by the plaintiffs here and was given credence by the court below. The Fifth Circuit's decision thus directly conflicts with *TWA v. IFFA*.[16]

II. ALPA'S DECISION TO ENTER INTO THE SETTLEMENT AGREEMENT WITH CONTINENTAL WAS ENTIRELY RATIONAL

Our showing in Part I establishes that under the proper legal standard, the Union did not breach its duty of fair representation. We now show that the same conclusion is required even under the legal standard adopted by the court of appeals in this case.

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[15] *Erie Resistor*, moreover, involved a unilateral action changing seniority list so that all non-strikers would be permanently senior to the strikers. In contrast, the order and award is directly analogous to the post-strike carrier conduct approved in *TWA v. IFFA*. *See* 109 S. Ct. at 1231.

[16] The court of appeals noted that the plaintiffs here had raised fair representation claims based on the fact that the strike settlement was not presented to the MEC for ratification and on alleged oral promises of ratification by the membership-at-large. In considering these claims the court below correctly noted that "the union members had no right to approve the settlement embodied in the order and award." J.A. 97. And the district court was correct in concluding that the plaintiffs presented no probative, admissible evidence on either claim.

A. As we have seen, the Fifth Circuit in this case held that to be non-arbitrary the union's decision must be the "rational result of the consideration of [relevant, permissible union] factors." That court recognized that even its expansive test of liability "requires more than a showing of negligence or 'honest, mistaken conduct,'" and that "it is insufficient to show merely 'that the union improperly balanced the rights and obligations of the various groups it represents.'" J.A. 88. But without further elaborating on its understanding of the "rationality" concept, the appellate court ruled that in this case a jury could find that "the settlement agreement . . . was so less favorable to the striking pilots than the likely consequences of a total surrender of the strike effort" as to render ALPA's agreement "irrational." J.A. 97.

In reaching this latter conclusion, the court of appeals proceeded from three legal premises: first, had ALPA surrendered unilaterally, "the returning strikers, as [Continental] employees, were entitled to reinstatement as vacancies occurred" (J.A. 90); second, the "bid positions [covered by the 85-5 bid position offer] were not filled"—and hence were deemed to be vacancies—"until pilots were trained and serving in these positions" (J.A. 92); and third, that in filling these so-called vacancies, "if the pilots had unconditionally agreed to return to work, [Continental] could not have changed its policy of assigning work by seniority . . . unless it had a legitimate and substantial business justification for doing so." J.A. 91. These premises formed the predicate for the appellate court's conclusion that a "jury could find that the order and award left the striking pilots worse off . . . than complete surrender." J.A. 89.

We show in a moment that in each respect, the court of appeals has answered—with the benefit of five years of legal development—questions of law that were very much unsettled as of 1985, and that, whatever may be true today, the legal uncertainty that existed as of 1985 made it entirely sensible for ALPA to settle for the pro-

verbial "half a loaf." Before turning to the legal climate as it existed in 1985, one preliminary observation is in order.

Even if it were true—contrary to what we show below—that the rights of returning strikers under the RLA had been settled as of 1985, and that the settlement agreement ALPA reached gave the strikers fewer recall rights than had been definitively declared to be theirs under the RLA, it still would not follow that the settlement is irrational.

To begin with, the settlement agreement also granted a severance pay option to the strikers, an option which the pilots would not otherwise have enjoyed as a matter of law. Furthermore, the settlement agreement provided for bankruptcy court enforcement jurisdiction and thus created a forum for ALPA to be heard on matters of concern to the striking pilots. Of at least equal moment, by securing Continental's agreement to the settlement, ALPA succeeded in pretermitting any and all litigation over the recall of the strikers and thereby assured that a certain number of pilots would enjoy immediate recall rights without having to forego their livelihoods during protracted litigation. Thus, looking at the matter most favorably to the complaining pilots, it *cannot* be said that if the settled law in 1985 was what the court of appeals posited, the settlement was irrational. Having said that much, we now meet the court of appeals' opinion on its own ground.

B. At the time ALPA made its strike settlement decisions, the Union was faced with a complex set of largely undetermined legal questions. The paucity of pertinent legal precedent existed for two reasons: First, until the airline industry labor disputes of the 1980's, there were very few decided RLA cases concerning the relative rights of striking employees, nonstriking employees, and permanent strike replacements, for the simple reason that there had been, until the deregulation of the airline industry, few instances in which employers governed by

the RLA had attempted to operate during a strike with permanent replacements or crossovers.[17]

Second, even to the extent that NLRA case law is properly imported into the RLA context—itself a debated question in 1985—that case law was not particularly informative in assessing the likely legal rights of the employees ALPA was representing during the Continental strike. That is so because those questions concerned practices common in the airline industry and having no clear counterpart outside that industry.

In our view it facilitates analysis to outline the various legal issues that could have arisen had ALPA MEC decided at its September, 1985 meeting to end the strike and make an offer to return to work without any strike settlement agreement. This approach permits us to consider, *from the perspective of the time*, the legal arguments that Continental would probably have made upon those issues, and assess whether ALPA had reason to believe that Continental had a sufficient chance of success on one or more of its arguments so that the striking pilots *could* have ended up in a substantially worse position, after years of litigation, than the position created by the negotiated settlement.[18]

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[17] *See* Airline Deregulation Act of 1978, 49 U.S.C. 1301 *et seq.* *See* Brief of the Airline Industry Industrial Relations Conference in *Trans World Airlines Inc. v. Independent Federation of Flight Attendants*, No. 87-548, at 22 (explaining that "[i]n the extraordinarily competitive post-deregulation airline industry, an air carrier confronted with a work stoppage of any duration has a strong impetus to attempt to operate").

[18] The court of appeals relied in part upon evidence that, in its view, indicated that whether or not legally obligated to do so, Continental would have returned striking pilots to work according to seniority, and would have "permitted strikers to bid for *vacancies* according to [the airline's] seniority-based assignment procedures." J.A. 91.

This disregards, in the first place, the basic difference between the Union and Continental concerning whether or not the jobs awarded in the 85-5 bid were "vacant." *See* pp. 46-47, *infra*.

That certain arguments were being made by employers in RLA cases at the time, and discussed by the courts as at least credible interpretations of the statute, indicates that Continental would have vigorously pursued the same line and that those issues would arise in any litigation over the rights of returning strikers, and raises the possibility that the arguments would be upheld by the courts in adjudicating the rights of the returning strikers.

1. *The General Protection Accorded Economic Strikers Under the RLA:* As of October, 1985, *no* case in this Court had *ever* addressed in *any* respect the parameters of the right of strikers covered by the RLA to reinstatement after a primary economic strike, nor were there any decided cases in the courts of appeal adjudicating on the merits the question of the statutory relief available to legal economic strikers who contend that their RLA rights had been compromised by the replacement rights accorded them upon abandonment of the strike. And, in the lower courts, employers were maintaining that RLA § 2, Third and Fourth of the RLA, unlike NLRA §§ 8(a)(1) and (3), either provide *no* protection whatever to strikers seeking to return to work after an economic strike, or do so only under much more limited circumstances than those under which strikers' reinstatement rights are protected under the NLRA.

Additionally, given the hostile relationship between the Union and the Company, the Union certainly had reason, in protecting the interests of the employees, to be suspicious of any gratuitous representations made by Continental, and to assess the situation instead upon the basis of what *enforceable* right the strikers would have under the RLA were they to offer to return to work without any strike settlement agreement to define their rights. Indeed, the fact that there was at the time a lawsuit pending between Continental and the union in which Continental was attempting to void all bids offered by strikers pursuant to the 85-5 bid, *see* p. 3, *supra*, provided ample reason to discount any employer suggestions of intent to permit returning strikers to participate in that bid on a strict seniority basis.

See International Ass'n of Machinists v. Northwest Airlines, Inc., 673 F.2d 700 (3d Cir. 1982).[19]

For example, in *Air Line Pilots Ass'n International v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *affirmed in part and reversed in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), a case in which ALPA was a party, the employer argued strenuously both in the district court and, one month after the settlement in this case, in the court of appeals, that the range of permissible employer self-help after exhaustion of the RLA dispute resolution mechanisms is much broader than the range of permissible self help under the NLRA. See 802 F.2d at 897.

In particular, the employer in that case maintained that RLA § 2, Third and Fourth do not parallel NLRA §§ 8(a)(1) and (3), because those sections were intended to apply only in the initial organizing context, and were directed at concerns with company unionism. 802 F.2d at 914-15. While ALPA vigorously contended otherwise in the *United Air Lines* litigation (*see id.*), and although the district court in *United Air Lines* held that RLA § 2 *is* comparable to NLRA § 8(a)(1) and (3) for purposes of determining the rights of strike replacements (614 F. Supp. at 1041), the court of appeals, in deciding *United Air Lines* treated the employer's arguments as substantial ones and did not reject those arguments in their entirety. *See* 802 F.2d at 897-98.[20]

[19] Several of the cases addressing the right of strikers to reinstatement under the RLA inclined toward the position that the reinstatement rights of RLA strikers were not settled by NLRA procedures, cases and concepts. *See Flight Engineers v. Eastern Airlines*, 359 F.2d 303, 307-309 (2d Cir. 1966); *National Airlines v. International Ass'n of Machinists*, 416 F.2d 998 (5th Cir. 1969); *National Airlines v. International Ass'n of Machinists*, 430 F.2d 957 (5th Cir. 1970); and *Empresa Ecuatoriana de Aviacion v. District Lodge No. 100*, 690 F.2d 838 (11th Cir. 1982) (all involved the reinstatement rights under the RLA participants in *illegal* strikes); *International Brotherhood of Teamsters v. Pan American World Airways*, 607 F. Supp. 609, 614 & n.5 (E.D.N.Y. 1985).

[20] Thus, the Seventh Circuit stressed that "simply because a practice [concerning strike replacements] is deemed unlawful under the NLRA does not automatically transfer into a finding that the same practice is unlawful under the RLA." 802 F.2d at 898. *See also id.* (not deciding whether the broad, *per se* rule of *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), against superseniority for strike replacements applies under the RLA, and instead affirming the holding below as to the validity of a system-wide rebid during the strike on narrower, fact-based ground); *id.* at 914-15 (rejecting other ALPA arguments based on analogies to the NLRA).

When this Court, a few years later, did have before it a case concerning the replacement rights of economic strikers under the RLA, *Trans World Airlines v. Independent Federation of Flight Attendants* ("*TWA v. IFFA*"), —— U.S. ——, 109 S. Ct. 1225 (1989), the question of the overall scope of protection accorded economic stikers under RLA § 2, Third and Fourth remained a live one with members of the Court expressing sharp disagreement concerning the scope of the employee protections afforded by § 2, Third and Fourth. *Compare* 109 S. Ct. at 1234-35 (majority opinion) *with id.* at 1235-36 (Brennan, J., dissenting) *and id.* at 1240-42 (Blackmun, J., dissenting).

The court of appeals opinion in this case, in describing the legal climate against which the settlement was negotiated, *entirely disregarded* these fundamental issues concerning the scope of striker protection under the RLA. The court below relied instead upon decisions of this Court, the court of appeals, and the National Labor Relations Board ("NLRB") decided under NLRA §§ 8(a)(1) and (3) as if the NLRA precedents were directly applicable. J.A. 91. But as this Court has cautioned, the NLRA has "no direct application" to the RLA and at most serves as an interpretive analog. *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 377 (1969).

Against that background, and regardless of how this issue would have been resolved on the merits in litigation between Continental and ALPA, it was unquestionably rational for ALPA to assume in 1985 that any attempt by ALPA to invalidate the 85-5 bid as contrary to the

RLA would be vigorously opposed by Continental on the ground that RLA § 2, Third and Fourth provide no protections to returning strikers that would justify invalidating the Company's allocation of seniority rights.

2. *The Validity of the 85-5 Bid*: At the time of the settlement decision, Continental had already awarded jobs under the 85-5 bid to the pilots then working that provided for its upcoming pilot training and staffing. The question whether Continental could be legally compelled to cancel the awards made under the bid in order to permit participation, on a seniority basis, by the returning strikers, again, presented substantial legal uncertainties.

First, as noted above, Continental at the time of the negotiations had rejected the collective bargaining agreement in the bankruptcy proceedings, and was contending that ALPA no longer represented the pilots at all. Consequently, there was the possibility that Continental could have unilaterally abandoned seniority for any and all purposes *within* the pilot workforce, including the job bidding process. Thus, even a successful attempt to upset the 85-5 bid would not have assured the returning strikers of upcoming vacancies in seniority order.

Second, the question whether or not the jobs awarded in the bids were "vacant" because the employees to whom the jobs had been promised would not actually go to work in those jobs for some time, or were "filled" because the commitments had been made and the past practice and particular training and scheduling needs of airlines may justify reliance on advance commitments, was a substantial one. Continental has contended that the Company had a legitimate and substantial business justification for limiting the 85-5 bid awards to working pilots; *viz.*, so that the training and planning necessary for an efficient expansion of the airline could be carried out in an orderly manner. ALPA, of course, had the rejoinder that the 85-5 bid positions remained subject to bidding by returning strikers in an unconditional return to work until the working pilots awarded the 85-5 bid positions actually

began training for or flying in these positions. But the RLA case law as of 1985 simply did not provide a basis for determining with any certainty whether the Union's argument would carry the day.

While the court of appeals viewed the district court opinion in *ALPA v. United Airlines* as dispositive on this question, a single district court opinion, hotly contested on appeal, can hardly be viewed as sufficiently certain legal precedent to eliminate all concern about sustaining the union's position in another district court, in a different circuit, on different facts.

Generalities aside, the particular fact-bound district court holding in *ALPA v. United* offered the most limited support to the Continental pilots. The employer in *ALPA v. United* declared every pilot position "vacant" as of the first day of the strike and attempted to rebid the entire airline with non-strikers after the strike ended 29 days later. 614 F. Supp. at 1039. The district court ruled that the employer lacked any business justification for implementing this system rebid and had attempted to do so solely out of an attempt to destroy ALPA. 614 F. Supp. at 1045-46. Continental, by contrast, had posted the 85-5 bid to meet operational needs in expanding the airline in the ordinary course of business under work rules that continued during the strike and advanced credible business justifications for locking in the 85-5 bid positions awarded to working pilots. At best, there was substantial doubt that ALPA could demonstrate (after years of litigation) that Continental intentionally posted and awarded the 85-5 bid without regard to business objectives and for the overriding purpose of undermining ALPA.[21]

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[21] Indeed, ALPA's concerns were subsequently confirmed by the Seventh Circuit's narrow affirmance of this aspect of *ALPA v. United* on appeal. The Seventh Circuit ruled that the United rebid in favor of non-strikers might be permissible under the RLA even after the strike if United could have shown that the rebid was necessary as the "first step in rebuilding the airline's pilot structure." 802 F.2d at 899. The United rebid was invalidated on appeal not because the "bid positions were not filled until pilots were

As a result, ALPA could not possibly have assumed that it would successfully invalidate the 85-5 bid results under the RLA if the pilots had unconditionally abandoned the strike.[22]

3. *The Seniority Recall Issue*: There was in 1985, and is now, the substantial possibility that, absent a contractual obligation to recall strikers in seniority order, Continental could have disregarded seniority considerations entirely in determining as among returning strikers which employees were to be reinstated, and in what positions.

There was no RLA case law at the time on the question of the validity of such a policy. And the NLRA case law as of 1985, even assuming its relevance, indicated that, absent an obligation to recall strikers in seniority order grounded in the parties' collective bargaining agreement or relevant past practice, the employer need not recall in seniority order, and may use any rational system for recalling strikers that does not

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trained and serving in these positions" at the end of the strike, as the court below supposed, J.A. 92, but only because the evidence showed that the rebid was actually motivated by an "intent to destroy the union" rather than any business need. 802 F.2d at 899-900.

[22] *IFFA v. TWA*, 819 F.2d 839 (8th Cir.), *cert. denied as to the pertinent question*, 485 U.S. 958 (1988), is entirely inapposite to a determination whether the bid positions were filled in the present context. The pertinent holding of that case—that trainees did not become permanent replacements until they had actually performed services—was based on the statutory definition of who is an "employee" for purposes of RLA coverage. 819 F.2d at 845; 45 U.S. § 181; *see ALPA v. United Air Lines*, *supra*, 802 F.2d at 911 (holding, in a separate part of the opinion from that concerning the rebid, that pilots who never actually performed services for the employer were not employees under the RLA, and were not protected by its provisions). Here, there is no doubt that both the individuals awarded jobs in the bid and the returning strikers were employees, covered by the statutory protection; the problem was to determine, as between such statutory employees, who was entitled to certain positions.

discriminate on the basis of degree of union activity. *Laidlaw Corp. v. NLRB*, 414 F.2d 99, 105 (1969), *quoting NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938); *see also NLRB v. Wells Fargo Armored Service Corp.*, 597 F.2d 7, 11 (1979); *Indiana Desk Co.*, 276 NLRB 1429 [No. 165] (1985); *cf. Bio-Science Laboratories*, 209 NLRB 796 (1974).[23]

ALPA was thus faced with substantial legal uncertainty over whether the RLA would require Continental to recall strikers to available pilot positions in seniority order and rationally sought such protection in the order and award.[24]

4. *Conclusion*—In sum, it simply is not true, as the court of appeals assumed, that the law, as it existed in 1985, granted the striking pilots clear and indisputable rights to the 85-5 bid jobs had the strikers unconditionally offered to return to work. It would have been irresponsible for ALPA to have assumed the contrary. Thus, ALPA acted soundly—and in all events rationally—in deciding to seek a settlement and in settling on the terms the Union then negotiated. A judge or jury could conclude otherwise only by holding the Union to a standard

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[23] Post-1985 cases confirm that, had ALPA had to litigate this question, Continental would have had substantial arguments for a striker recall system that disregarded seniority altogether, in favor, for example, of merit, age, alphabetical order, or former position, in distributing available vacancies. *See Lone Star Industries*, 279 NLRB 550, 551 (1986), *on remand*, 298 NLRB No. 160; *NLRB v. American Olean Tile*, 826 F.2d 1496, 1501 (6th Cir. 1987).

[24] Similarly, Continental might well have continued its confrontational approach and refused to reinstate strikers who "had 'obtained regular and substantially equivalent employment,' . . . [where] the company could show that [the strikers] could not be reinstated because of 'legitimate and substantial business reasons,' . . . or [who had] engaged in sufficient misconduct 'to remove [them] from the protection of the [National Labor Relations] Act. . . .'" *OCAW* v. *American Petrofina Co.*, 820 F.2d 747, 750 (5th Cir. 1987) (citations omitted). The order and award also resolved this legal uncertainty in the strikers' favor.

of perfect foresight or by taking over the Union's responsibility of weighing the risks and potential benefits of not settling. Such judicial involvement in collective bargaining negotiations would strike at the heart of the national labor policy.

CONCLUSION

For the above stated reasons, the decision below should be reversed and remanded with instructions to reinstate summary judgment for the petitioner.

Respectfully submitted,

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